No. 264

In the

Supreme Court of the United States

OCTOBER TERM 1963

JAMES P. DONOVAN, *et al.*,

Petitioners,

v.

CITY OF DALLAS, *et al.*,

Respondents.

Application for Writ of Certiorari to the Supreme Court of Civil Appeals, 5th Supreme Judicial District of Texas, and the United States District Court, Northern District of Texas

PETITIONERS' BRIEF ON THE MERITS

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OPINIONS BELOW

The opinion of the Supreme Court of Texas in *City of Dallas et al. v. Dixon et al.* (R. 276-286) is reported in 365 SW 2d 919.

The opinion of the Court of Civil Appeals, 5th Supreme Judicial District of Texas in *City of Dallas et al. v. Brown et al.* (R. 10-18) is reported in 362 SW 2d 372.

The opinion of the Court of Civil Appeals, 5th Supreme Judicial District of Texas in the Contempt Proceeding, ancillary to *City of Dallas et al. v. Brown et al.* is reported in 368 SW 2d 240.

The oral opinion of the United States District Court, Northern District of Texas in *Brown et al. v. City of Dallas et al.* is unreported, but is set out in the Record herein at page 306.

The oral opinion of the United States District Court, Northern District of Texas in *Donovan v. Supreme Court of Texas* is unreported, but is set out in the Record herein at pages 347-353.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1257, to review the following Judgments entered in violation of Articles III and IV, and Amendments V and XIV of the Constitution of the United States and applicable Federal Statutes:

Judgment of the Supreme Court of Texas entered in *City of Dallas et al v. Dixon*, March 13, 1963 (R. 58), Motion for Rehearing Denied April 10, 1963. (R. 78)

Judgment of Contempt entered by the Court of Civil Appeals, 5th Supreme Judicial District of Texas, in *City of Dallas et al. v. Brown et al.*, May 22, 1963. (R. 248)

Jurisdiction of this Court is invoked under Title 28 U.S.C. §1651, to review the Judgments of the United States District Court, Northern District of Texas, entered in *Brown et al. v. City of Dallas et al.*, May 9, 1963, (R. 307) and June 14, 1963; (R. 315); and the Judgment entered by said United States District Court in *Donovan et al., v. Supreme Court of Texas et al.*, on June 21, 1963 (R. 353)

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following provisions of the United States Constitution which are found in the U.S.C. Const. Art. 1 at the page indicated: Article III, §1 and 2, page 43; Article IV, §2, page 43; Amendment V, page 47; and Amendment XIV, Section 1, page 49.

Relevant Federal Statutes include the following Sections of the United States Code: Title 42; Sections 1971, 1981, 1983, 1985(2), pp. 67, 71, 85 and 142; Title 15 U.S.C. Sections 77q and 77v, pp. 91, 152; Title 28, Sections 1331, 1343, 1651 and 2283, pp. 92, 202, 2, and 49; Federal Rules of Civil Procedure, Rules 12, 56; 28 U.S.C.A. pp. 20, 56.

The provisions of the Texas Constitution, Statutes and Rules of Civil Procedure, involved in this case, include: Texas Constitution, Article 1, Section 3; Article 1, Section 19; Article 5, Section 3; (Vernon's Texas Constitution, Volume 1, pp. 1, 3, 6, 45.) Texas Revised Civil Statutes: Article 46d-9 (Vol. 1 V.T.C.S. p. 198); Article 701 (Vol. 2 V.T.C.S. p. 186); Article 1733 (Vol. 3B V.T.C.S. p. 285); Texas Rules of Civil Procedure, Rule 394 (V.A.T.R.C.P. p. 198), Rule 483 (Id. p. 440).

The relevant portions of the cited provisions are set forth verbatim in the Appendix hereto.

QUESTIONS PRESENTED

1. May the Supreme Court of Texas, *acting without appellate jurisdiction*, mandamus the reversal of the Judgment

of another State Court, directing the trial court to prohibit Petitioners from further prosecuting a pending Federal Court action; thereby usurping the Judicial Power vested in the United States Courts by the Constitution and Statutes of the United States?

2. May the Supreme Court of Texas usurp the Judicial Power of the United States District Court to determine a plea of res judicata, pleaded in a pending Federal Court action?

3. May the Supreme Court of Texas exercise jurisdiction, not granted by the Texas Constitution and Statutes, to prevent further prosecution of a pending Federal Court action?

4. May the Texas Court of Civil Appeals, *without notice to parties to a final Judgment,* reverse that Judgment denying a Writ of Prohibition, and issue such a Writ to prohibit Petitioners from prosecuting a pending suit in Federal Court?

5. May the Texas Court of Civil Appeals, *without issuance of legal process or service thereof according to law,* fine 85 citizens $17,400 for attempting to prosecute their rights under Federal Law in a pending Federal Court action; and were such fines excessive and unconstitutional?

6. May the Texas Court of Civil Appeals fine the Petitioners and sentence their lawyer to jail, for filing an injunction action in Federal Court seeking restraint of State Courts' interference with their pendng Federal action, when no prohibition existed against such injunction suit?

7. May the United States District Court *abandon its jurisdiction*, by substituting for its judgment the judgment of a State Court, to dismiss a pending Federal suit, and aid in the enforcement of a State Court Order, *illegally entered*, by dismissing Petitioners' Appeal to the Court of Appeals, Fifth Circuit, upon Petitioners' request filed under State Court threats of fine and imprisonment?

8. May Petitioners be convicted of contempt after a hearing in which no legal proof of the existence of a valid court order, under which Petitioners were cited to show cause as to why they should not be punished for contempt, was offered, and in which no proof of the legal service of such order was tendered?

STATEMENT OF THE CASE

On June 23, 1961 in a cause entitled: *George S. Atkinson et al., v. City of Dallas*, hereinafter referred to as the *Atkinson* case, forty-six Dallas citizens, including sixteen of the Petitioners herein, filed their First Amended Original Petition (R. 20) therein seeking injunctive relief against one Defendant, the City of Dallas. That Defendant answered said Amended Petition (R. 20) and moved for Summary Judgment, its Motion being granted on July 17, 1961. The Judgment was affirmed by the Respondent Court of Civil Appeals, opinion reported in 353 S.W. 2d 275; the Respondent Supreme Court of Texas refused Plaintiffs' application for Writ of Error, N.R.E., and this Court denied Certiorari June 25, 1962. (8 L. Ed. 808) Rehearing was refused on October 8, 1962.

Plaintiffs in the *Atkinson* case sued individually and as representatives of Class defined as: "the home owners, families and individuals who live, work, reside and attend schools, churches and other community centers in the area embraced within the approach areas of planned runway 13R/31L;" the "planned runway" mentioned had reference to construction of a proposed new runway at Love Field, a Municipal Airport owned by the Defendant City of Dallas, Texas. (R. 22)

The relief prayed for in the *Atkinson* case was an injunction against: Defendant's construction of the proposed runway; Defendant's issuance of municipal bonds, other than those authorized by the Constitution of the State of Texas; Defendant's lending of public credit or funds in aid of private persons; Defendant's issuance of bonds without approval by vote of qualified taxpayers; and Defendant's submission to voters approval, any new or additional bonds the issuance of which would increase the City's indebtedness beyond the statutory limits. (R. 35, 36) The grounds upon which the prayer for relief was based were: threatened seizure of Plaintiffs' air rights without first making compensation therefor; irreparable damage to Plaintiffs through operation of jet aircraft over their property; ultra vires activity of the City contrary to Federal Regulations and Standards of safety; creation of a public nuisance through use of the proposed runway; arbitrary and capricious action contrary to public interest; and *proposed* financing of the project by a *proposed* illegal issue of bonds. (R. 22-35)

After Certiorari was denied in the *Atkinson* case, and on September 24, 1962, one hundred twenty Dallas citizens, including only twenty-seven of the *Atkinson* Plaintiffs joined by twenty-two of their wives and seventy-one persons, not parties to the *Atkinson* case, filed a Complaint in the United States District Court, Northern District of Texas in an action entitled: "*Daniel C. Brown et al., v. City of Dallas et al.*," hereinafter referred to as the "*Brown*" case; (R. 255-263) The Plaintiffs sued individually, and did *not* claim representation of any Class.

The Parties Defendant in the *Brown* case were: the City of Dallas, the Attorney General of the State of Texas, nine members of the Dallas City Council, the City Manager, City Auditor, City Secretary, City Attorney and City Airport Director, two security dealers, a firm of bond attorneys, and five individuals sued individually and *as representatives of the Class*, consisting of holders of the outstanding bonds under attack. (R. 256-258)

The prayer in the *Brown* case was for an injunction against the payment of *outstanding* City of Dallas Airport Revenue Bonds, identified by Series number, or any other Airport Revenue Bonds issued without approval at a taxpayers' election; an injunction against construction of a parallel instrument runway within the existing limits of Love Field; an injunction against circulation by the Defendants of false information to induce purchase of Airport Revenue Bond Series 401, (R. 262); and Judgment declaring the *outstanding* Airport Revenue Bonds void. (R. 263) The *Brown* case prayer for relief was predicated upon the following

grounds: deprivation of Plaintiffs' Civil Rights guaranteed by the United States Constitution, and United States Statutes, Title 42, Sections 1971, 1981, 1983 and 1985, under color of law, through denial of the taxpayers election provided for by Article 46d-9 of the Revised Civil Statutes of Texas; construction of an airport runway in violation of United States Statutes and Regulations adopted pursuant thereto, resulting in the burdening of interstate commerce in violation of Article 1, Section 8 of the United States Constitution; and violation by the Defendants of Federal Statutes prohibiting use of the mails to defraud and the Securities Exchange Act banning the circulation of false and fraudulent statements to induce the sale of bonds. (R. 258-262)

Issue was joined in the *Brown* case, September 25, 1962, and a Motion to dismiss and Answer were filed October 12, 1962, during the pendency of the *Prohibition* case hereinafter summarized. (R. 267) That pleading contained pleas of: lack of jurisdiction, no showing of violation of Civil Rights, *res judicata by reason of the Atkinson case*, (R. 267-270) and certain specific admissions and denials. (R. 270-273) Plaintiffs' Motion to the United States District Court for an injunction against the State Courts' interference with the *Brown* action was denied October 10, 1962. (R. 6) On April 24, 1963, Defendants filed a supplemental Motion to Dismiss the *Brown* case, pleading the action taken in the *Mandamus* and *Prohibition* cases, hereinafter described, by the Respondent Courts. (R. 274) Plaintiffs answered and moved for a continuance and treatment of the Motion as a

Motion for Summary Judgment, as provided in Rule 12 of the Federal Rules of Procedure. (R. 290, 291). That Motion was denied. (R. 310) After hearing the Motions to Dismiss the United States District Judge stated: "You and the litigants in this case have been prohibited from proceeding in this case and therefore I dismiss the case as asked by the City Attorney's office." (R. 306) Prior to this hearing the Court orally approved withdrawal and addition of Parties Plaintiff, reducing said approval to writing by Order entered May 9, 1963. (R. 308, 309). The new Plaintiffs permitted to intervene had not been parties to the *Atkinson* case.

On May 15, 1963 the *Brown* case Plaintiffs perfected an appeal to the United States Court of Appeals, Fifth Circuit. (R. 311, 313) On June 11, 1963, *acting under duress of threatened additional fines and imprisonment* (R. 314, 315) the Appellants moved to dismiss the Appeal, which Motion was granted June 14, 1963. (R. 315, 316)

While the *Brown* case was pending in the United States District Court, on October 6, 1962, the City of Dallas, joined by the other 23 Defendants in the *Brown* case, who were *not* parties to the *Atkinson* case, filed a Petition for Writ of Prohibition and Ancillary Orders under the style of "City of Dallas et al., v. Daniel C. Brown et al." which action will be referred to herein as the "Prohibition" case. The Respondents named therein were the Plaintiffs in the *Brown* case, ninety-three of whom had not been parties to the *Atkinson* case. (R. 10, 20, 255). The United States District Judge was *not* a party to the Prohibition proceeding. (Id.) The Petition sought a Writ prohibiting further prose-

cution of the *Brown* case by the Respondents. Issue was joined by Respondents, and after a full and complete hearing, the Respondent Court of Civil Appeals *denied* the Petition for Writ of Prohibition stating that the pendency of the *Brown* case in Federal Court "does not invade our exclusive jurisdiction, though the issue in the suit may be the same as the issues decided in our judgment (*Atkinson* case) of affirmance. Ours is not the only Court which has jurisdiction to enfore a plea of res judicata in support of our judgment of affirmance of December 15, 1961. That defense may be and has been pled by the City in Action 9276 in the United States District Court, (*Brown* case) and that Court has jurisdiction to hear and give effect to the plea." (R. 12, 13) One Justice dissented (R. 16), but Judgment, denying the Writ of Prohibition, was entered October 24, 1962 and Motion for Rehearing overruled November 23, 1962. (R. 19) This Judgment became final upon denial of the Motion for Rehearing and *was not reviewable by the Supreme Court of Texas by appeal or writ of error.* (R. 277)

Without notice to Respondents in the *Prohibition* case, Chief Justice Dixon of the Respondent Court of Civil Appeals purported to reverse this Judgment by alleged order of April 16, 1963. (R. 80)

Denied relief in the *Prohibition* case, the Petitioners therein filed a Petition for Writ of Mandamus with the Supreme Court of Texas, styled "City of Dallas et al., v. Honorable Dick Dixon et al.", herein referred to as the "*Mandamus*" case. The parties were the same as in the *Prohibition* case, except for the addition of the Justices of the Respondent

Court of Civil Appeals. The Petition recited the City's version of the *Atkinson* case, the *Brown* case and the *Prohibition* case (R. 2-7) and prayed for a Mandamus to the Respondent Court of Civil Appeals directing it to grant the relief prayed for in the *Prohibition* case: a Writ of Prohibition against the Plaintiffs in the *Brown* case pending in the United States District Court, and those similarly situated as Plaintiffs, together with such Ancillary Mandatory Orders as may be necessary to give full force and effect to the Judgment rendered by the Respondent Court of Civil Appeals in the *Atkinson* case, and to further refrain from further litigating the matter in any Court. (R. 7) Respondents in the *Mandamus* action answered making affirmative denials of fact allegations in the Petition, questioning the Court's jurisdiction and raising issues of denial of Respondents' rights under the Constitution and laws of the United States. (R. 54-58) The Supreme Court of Texas rendered an opinion (R. 276-286) stating that the Writ would issue unless the Respondent Court of Civil Appeals conformed to the dictates of the opinion, and entered a Judgment entitled "Original Mandamus" on March 13, 1963. (R. 288, 289) Motion for Rehearing was denied April 10, 1963 (R. 287) The Court's Judgment taxed costs *only* against the Plaintiffs in the *Atkinson* case, although seventeen of those persons were *not* parties to either the *Prohibition* or the *Mandamus* cases.

On April 16, 1963, *without notice* to the Respondents or an appearance in their behalf, Chief Justice Dixon, purporting to act in the *Prohibition* case, signed an Order en-

titled "Writ of Prohibition and Ancillary Orders". (R. 78-82) This Order purported to reverse the Judgment of October 24, 1962, but it did not bear either the seal of the Court or the signature of the Clerk. (R. 203) No personal service of this Order was made on either the Respondents in the Prohibition action or their Attorney of Record; copies were allegedly mailed to the parties involved. (R. 201, 202, 244) The alleged Writ of Prohibition prohibited James P. Donovan, individually and as attorney, and any other agents, attorneys or representatives, of the Respondents in the *Prohibition* case, and those Respondents each and every one, individually and *as a class of taxpayers* and residents and landowners in the vicinity of Love Field, together with all other persons similarly situated from "prosecuting, urging or in any manner seeking to litigate, as Attorney and/or plaintiffs" the *Brown* case pending in Federal Court, and "from filing or instituting any litigation, lawsuits or other actions seeking to contest the right of the City of Dallas to proceed with the construction of the parallel runway as presently proposed at Love Field situated within the City of Dallas, Texas, or from instituting and prosecuting any further litigation, lawsuits or actions in any court, the purpose of which is to contest the validity of the airport bonds *heretofore* issued under authority of Article 1269j, V.A.C.S. *or that might be issued* under said Article for the construction of the Love Field runway and the ancillary improvements in connection therewith, or from in any manner interfering with, or casting any cloud upon, or slandering the title of, or interfering with the delivery of, the proposed

bonds by the City of Dallas, any of its agents or representatives or others seeking to assist in the sale and delivery of the same". (R. 80; 81) Respondents were further prohibited individually, and as a class, "and others in the same class" from in any manner interfering with the enforcement and execution of the judgment in the *Atkinson* case. (R. 81) The Judge then included three paragraphs calculated to avoid the stautory requirements of Rule 394, Texas Rules of Civil Procedure as to process and service thereof.

On April 23, 1963, eight-eight of the Plaintiffs in the *Brown* case, joined by their Attorney, filed an action in the United States District Court, Northern District of Texas, entitled "James P. Donovan et al., v. Supreme Court of Texas et al.," herein referred to as the "*Injunction*" case. The Defendants in that case were the Respondent Court of Civil Appeals, the Supreme Court of Texas and the Justices of those Courts. (R. 316-324) This Complaint alleged the action in the *Prohibition* and *Mandamus* cases and prayed for a restraining order, a temporary and permanent injunction against the Respondent State Courts' taking any further action interfering with or tending to interfere with Plaintiffs' prosecution of their *Brown* case in Federal Court. (R. 322, 323) The Attorney General for the State of Texas appeared for the Courts and Justices thereof on May 8, 1963 and filed a Motion to Dismiss and an Answer. (R. 324-326). Prior to the hearing of his Motion to Dismiss the Court approved the withdrawal of thirty-one Plaintiffs and the addition of seven new ones; an Order

was entered thereon May 9, 1963. (R. 331) The *Injunction* case was dismissed by the Federal Court as Moot (R. 352) May 16, 1963 and an Order entered thereon June 21, 1963. (R. 353)

On May 7, 1963 the City of Dallas filed a Motion for Contempt in the *Prohibition* case before the Respondent Court of Civil Appeals (R. 82-90) asking that the Court punish all Plaintiffs in the *Brown* and *Injunction* cases, the two Federal Court actions for violation of the alleged Writ of Prohibition. Included were the seven Plaintiffs added after the supposed issuance and service of the Writ. Orders to Show Cause (R. 241) were issued and served which were identical except as to the number of Contempt Charges included and the Identity of the Respondent. The violations charged in these Orders were distributed into three classes, (R. 109, 110): Class 1 was charged with (A) failing to request dismissal of the *Brown* case; (B) contesting the dismissal of said case; (C) taking exception to the Court's Order of Dismissal; (D) filing the *Injunction* case against the Respondent Courts in Federal Court; Class 2 was charged only with (D) filing the *Injunction* suit in Federal Court; and Class 3, consisting of the seven added Plaintiffs in the *Brown* case, not parties to the *Prohibition* case, who were charged with contempt in joining as Plaintiffs in the Federal Court *Brown* case and contesting dismissal thereof. (R. 109, 110) (R. 177-179) Respondents filed a Motion to Quash and an Answer to the Charges of Contempt. (R. 109-117) The Motion to Quash was overruled. (R. 162) After hearing testimony of May 20, 1963

(R. 162-235) the hearing was adjourned to May 22, 1963, at which time the Court announced its decision (R. 235-240) and entered its Judgment holding Respondents in Contempt. (R. 248-254) Respondents Motion for a stay of execution were denied; (R. 240) the Respondent Petitioner James P. Donovan was committed to the Dallas County Jail without bail, and confined until June 10, 1963; the other Respondents, Petitioners herein were compelled under threat of imprisonment to pay their fines and Court costs. Three days before the Attorney was released from jail, after applications for Writs of Habeas Corpus had been denied, the Respondent Court of Civil Appeals wrote an opinion in support of its Judgment of Contempt. (368 S.W. 2d 240)

No Review of the *Contempt* Judgment or the *Prohibition* Judgment was available under Texas Procedure.

The Petition for Writ of Certiorari to the Supreme Court of the State of Texas and the Court of Civil Appeals of the State of Texas Fifth Supreme Judicial District was granted by this Court October 21, 1963. (R. 354)

SUMMARY OF ARGUMENT

The Judicial Power of the United States is vested by the Constitution in the Federal Courts. The Respondent State Courts were without jurisdiction to prohibit the Petitioners from prosecution of the *Brown* and *Injunction* cases in the Federal forum to secure their rights arising under Federal law.

The State Courts lacked jurisdiction to determine the validity of the defense of res judicata interposed in the

Brown case, and such determination, being contrary to the evidence of record, constituted a denial to Petitioners of due process of law.

The United States District Court, vested with jurisdiction over the subject matter and the parties in the *Brown* and *Injunction* cases could not legally abandon that jurisdiction; neither could it accept judgments made by the State Courts as conclusive of the issues raised therein.

The Respondent Supreme Court of Texas is a Court of limited jurisdiction. It has no supervisory jurisdiction over the Respondent Court of Civil Appeals, and had no Appellate Jurisdiction over that Court relative to the Judgment denying Writ of Prohibition. By law it is limited to issuance of the writ of mandamus *only* agreeable to the principles of law regulating that writ. That Court's issuance of the Writ of Mandamus to dictate the manner in which the Court of Civil Appeals should exercise its discretion, predicated upon reversal of a final judgment and express findings of fact, was without the jurisdiction of the Supreme Court of Texas and void.

The actions of the Respondent State Courts in denying Petitioners the benefit of established principles of law constituted a denial of due process.

The actions of the Respondent Court of Civil Appeals taken under authority of the void order of the Supreme Court of Texas was wholly void; the action of the Respondent Court of Civil Appeals, taken in direct violation of statutory rules governing process was void.

The action of the Respondent Court of Civil Appeals in convicting the Petitioners of Contempt of a void court order was a denial of due process and equal protection of the law; the conviction of contempt for acts not expressly prohibited by the alleged court order violated, constitutes a denial of due process.

All judgments and orders entered by the State Courts subsequent to the Judgment of the Court of Civil Appeals, denying the Writ of Prohibition, were void for want of jurisdiction and should be reversed.

The Respondent Court of Civil Appeals should be ordered to reinstate the Judgment denying the Writ of Prohibition, and the United States District Court should be ordered to reverse its Judgment of Dismissal in the *Brown* and *Injunction* cases, reinstating the *Brown* case for trial on the merits, and granting the injunction prayed for in the *Injunction* case. This Court has authority to take such action under Title 28, Section 1651 of the United States Code.

ARGUMENT

POINT ONE

The Respondent State Courts lacked jurisdiction to prohibit Petitioners from prosecution of actions in the United States District Court.

The Constitution of the United States expressly provides: "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." Art.

III, §1. It also states: "The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority;" Art. III, §2.

The Complaint filed in the *Brown* case in the United States District Court alleged: That this action arises under the 14th Amendment of the Constitution of the United States, Section 1; U.S.C. Title 42, Sections 1971, 1981, 1983, 1985; and U.S.C. Title 15, Section 77q; this Court has jurisdiction of this cause under U.S.C. Title 28, Sections 1331 and 1343, and U.S.C. Title 15, Section 77v." (R. 256) The Defendants in the case submitted to the jurisdiction of the District Court by filing on September 25, 1962 a Motion to Advance (R. 263) and a Motion to Dismiss and Answer on October 12, 1962. (R. 267) Though both pleadings set up a defense of res judicata, based on the *Atkinson* case, no hearing was requested and the Defendants sought a Writ of Prohibition from the Respondent State Courts to enjoin the prosecution of the Federal action. The United States District Court refused Plaintiffs' application to enjoin State Court interference, (R. 12) with their prosecution of their Federal suit. The Court of Civil Appeals denied Defendants' Petition for Writ of Prohibition, (R. 10) but subsequently issued such a Writ in compliance with the judgment and orders of the Supreme Court of Texas, (R. 78) and prohibited Petitioners from further prosecution of the *Brown* case then pending in Federal Court. The Brown Plaintiffs again asked the United States District Court to enjoin State Court interference with their Federal suit

through an Injunction action. (R. 316) Both Federal actions were dismissed by the United States District Court, on the theory that the Plaintiffs therein were bound by the State Court Prohibition Order which was a legal bar to further proceedings in Federal Court. (R. 306, 352.) For attempting to protect their rights in Federal Court the Petitioners were held in Contempt of the Respondent Court of Civil Appeals and punished by fine or imprisonment. (R. 248)

It has long been established that State Courts are without legal authority to enjoin proceedings in Federal Courts, once jurisdiction has attached. *U. S. v. Keokuk* 73 U.S. 514, 6 Wall 514, 18 L. Ed. 933; *Riggs v. Johnson County*, 6 Wall 166, 18 L. Ed. 768; *Weber v. Lee County*, 6 Wall 210, 18 L. Ed. 781.

The reason for the rule, and the law of this case is clearly set out in *Central National Bank v. Stevens*, 169 U. S. 432, 42 L. Ed. 807, where it is written at pages 439 and 817:

> "It is a doctrine of law, too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment till reversed, is regarded as binding in every other court; and *that where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court.* (Emphasis ours) These rules have their foundation, not merely in comity, but on necessity. For, if one may enjoin, the other may retort by injunction, and thus the parties be without a remedy;

being liable to process for contempt in one, if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice. In the case of Kennedy v. the Earl of Cassillio (2 Swanst. 321) Lord Eldon at one time granted an injunction to restrain a party from proceeding in a suit pending in the court of sessions of Scotland, which on more mature reflection he dissolved; because it was admitted, if the court of chancery could in that way restrain proceedings in an independent foreign tribunal, the court of sessions might equally enjoin the parties from proceeding in Chancery, and thus they would be unable to proceed in either court. *The fact, therefore, that an injunction issues only to the parties before the court, and not to the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is litigant in another and independent forum.* (Emphasis ours) Peck v. Jeness, per Mr. Justice Grier, 48 U.S. 7, How. 612, 624, 12 L. Ed. 841, 846.

"State Courts are exempt from all interference by the Federal Tribunals, but they are destitute of all power to restrain either the process or proceedings in the national courts. Circuit courts and state courts act separately and independently of each other, and in their respective spheres of action the process issued by the one is as far beyond the reach of the other as if the line of division between them were traced by landmarks and monuments visible to the eye. Appellate relations exist in a class of cases between the state courts and this court, but there are no such relations between the state courts and the circuit courts. Viewed in any light, therefore, it is obvious that the injunction of a state court is inoperative to control, or in any manner to affect the process or proceedings of a circuit court, not on account of any paramount jurisdiction in the latter courts, but because in their sphere of action circuit

courts are wholly independent of state tribunals. Riggs v. Johnson County (United States, Riggs v. Johnson Supers.) 73 U.S. 6 Wall. 166."

Whether due effect has been given by a state court to a judgment or decree of a court of the United States is a Federal question within the jurisdiction of this court on a Writ of Error to the Supreme Court of the State. *Crescent City Live Stock L. & S.H. Company v. Butchers Union Slaughter House & L. & S.H. Company*, 120 U.S. 141.

The exemption of the authority of the courts of the United States from interference by legislative or judicial action of the states is essential to their independence and efficiency. *Freeman v. Howe*, 65 U.S. 24 How. 450; *Buck v. Colbath*, 70 U.S. 3 Wall 334; *Rio Grande RR. Co. v. Gomila (Rio Grande R. Co. v. Vinet)* 132 U.S. 478.

In Story's Equity Jurisprudence, Vol. 2, §900, it is said, referring to the power sometimes exercised by Courts of Equity, to restrain parties within their jurisdiction from proceeding in foreign courts: "There is one exception to this doctrine that has long been recognized in America, and that is that the State Courts, cannot enjoin proceedings in the Courts of the United States, nor the latter in the former courts."

While Congress has, since the delivery of the foregoing opinion granted certain rights of injunction to the Federal Courts, no such rights have been created in the State Courts.

Limited injunctive powers in State Courts to protect their jurisdiction in *in rem* actions has been recognized by the Federal Courts. *Princess Lida v. Thompson*, 305 U.S. 456,

59 S. Ct. 275, 83 L. Ed. 285; *Blanchard v. Commonwealth Oil Co.*, 294 Fed. 2d 834. However, the *Princess Lida* case recognizes this distinction between *in rem* and *in personam* actions and the rules applicable thereto by quoting from *Penn General Casualty Co. v. Pennsylvania*, 294 U.S. 189, 195; 79 L. Ed. 850, 855: "* * * if both courts were to proceed they would be required to cover the same ground. This of itself is not conclusive of the question of the District Court's jurisdiction, for it is settled that where the judgment is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other."

The *Blanchard* case, supra, cited *B & O RR. Co. v. Kepner*, 314 U.S. 44, 51-52 quoting: "We have therefore for decision in this case the question whether a state court may validly exercise its equitable jurisdiction to enjoin a resident of the State from prosecuting a cause of action arising under the Federal Employees Liability Act in a Federal Court of another state where that act governs venue, on the ground that the prosecution in the federal court is inequitable, vexatious and harassing to the carrier." * * * under such circumstances petitioner asserts power, abstractly speaking in the Ohio Court to prevent a resident under its jurisdiction from doing inequity. * * * It is clear that the allowance or denial of this federal privilege is a matter of federal law not a matter of state law. Its correct decision depends upon a construction of a

federal act. Consequently the action of a state court must be in accord with the federal statutes and the federal rule as to its application rather than state rule or policy." * * * "It is obvious that no state statute could vary the venue and we think equally true that *no state court* may interfere with the privilege, for the benefit of the carrier, or the national transportation system, on the ground of inequity based on cost, inconvenience or harrassment."

It is submitted that the foregoing citations establish the proposition that a State Court is without jurisdiction to issue an injunction or Writ of Prohibition to control, or in any manner affect the action, the process, or the proceeding of a United States District Court where that Court has jurisdiction of the subject matter and the parties. Were the rule otherwise, State Courts could easily usurp jurisdiction and limit their citizens to the local forum by, as in the instant case, making a finding of res judicata binding on a class. For example in the civil rights field, there is hardly a State in the South where actions of a class nature have not been brought in State Courts. If the action of the State Courts in this matter is legal, there is nothing to prevent the State Courts from holding that those decisions are res judicata of the negroes' right to vote and their right to integration, and binding on the Class, the negroes. Having made such a holding, the State Courts could then enjoin all negroes from seeking relief in the Federal Courts, and thus deprive them of their right to an adjudication in the federal forum under federal law. Such a position is untenable.

POINT TWO

The United States District Court, having jurisdiction of the subject matter and parties to a cause, is obligated to exercise that jurisdiction, defend it and decide it on the basis of Federal Law.

The obligation of the United States Courts to exercise jurisdiction in those matters delegated to them by the Constitution and Laws of the United States was considered in *Willcox v. Consolidated Gas Co.*, 212 U.S. 19; 29 S. Ct. 192; 3 L. Ed. 382, pp. 40, 209, 394 where it is written:

> "They assume to criticize the court for taking jurisdiction of this case as precipitate, as if it were a question of discretion or comity, whether or not that court should have heard the case. On the contrary, there was no discretion or comity about it. When a Federal Court is properly appealed to in a case in which it has by law jurisdiction, it is its duty to take jurisdiction. (Cohen v. Virginia 6 Wheat 264, 404; 5 L. Ed. 257, 291) and in taking it, that court cannot be truthfully spoken of as precipitate in its conduct. That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different states or a question is involved which, by law brings the case within the jurisdiction of a Federal Court. *The right of a party plaintiff to choose a Federal court, where there is a choice, cannot be properly denied.*" (Emphasis ours)

Title 28 U.S.C. 1651 (App. A-4) authorizes all United States Courts to issue all writs necessary in aid of their respective jurisdictions. To clarify the rule propounded by the Courts, Section 2283 of Title 28 was amended to grant the Federal Courts power to grant an injunction to stay proceedings in State Courts. (App. A-4) These statutes

have been applied in numerous cases consistently with the rule of law as stated in *Kansas City Gas Co. v. Kansas City*, 198 Fed. 500: "The rule is well settled that where the jurisdiction of a court of the United States has attached, the right of the plaintiff to prosecute his suit in such court to a final determination there cannot be arrested, defeated or impaired by any subsequent action or proceeding of the defendant respecting the same subject matter in a state court."

The elements essential to the application of this rule of law existed in the instant case. The Complaints in the *Brown* case and the *Injunction* case alleged causes of action within the jurisdiction of the United States District Court; (R. 255-263; 316-323) the Defendants in both cases appeared and answered: (R. 263-273; 327-330) In the *Brown* case the Defendants raised the issue of res judicata both as a basis of Motion to Dismiss and by way of defense. (R. 263-273) They then abandoned the Federal forum and applied to the State Courts for Judgment on this issue. The Plaintiffs in those cases invoked the jurisdiction of the United States District Court to protect them against the State Courts' interference by timely application for an injunction, filed in the *Brown* case (R. 6) and by the filing of the *Injunction* case. The District Court abandoned its jurisdiction, subjugated its Judgment to that of the State Courts and refused to exercise its own judgment on the pleaded issue of res judicata. (R. 306, 352)

As a result of this failure of the United States District Court to protect the Petitioners' rights to trial of their cause

in the Federal forum, Petitioners were placed in the position anticipated in *Central National Bank v. Stevens, supra.* They were forced to elect between the abandonment of their rights under law, and the risk of punishment for contempt. The result of their election brought the punishment for contempt, left them without a valid determination of their rights by a Federal Court, and under the duress of threat of additional fines and imprisonment compelled them to abandon their appeal from the adverse decision of the Federal Court. (R. 314, 315) In this situation the rights claimed by Petitioners in the *Brown* case under the Constitution and Statutes of the United States have been forever denied without a legal hearing, unless this Court reverse the action of the United States District and Respondent State Courts.

POINT THREE

The record demonstrates that the Atkinson Judgment was not res judicata of the issues raised in the Brown Case.

In consideration of the question of whether the judgment in the *Atkinson* case was res *judicata* of the issues raised in the *Brown* case, it must be remembered that under Federal Rules of pleading Plaintiffs are not required to plead evidence. The Summary Judgment was entered in the Atkinson case on *July 17, 1961* (R. 3) The pleadings upon which such Judgment was granted consisted of Plaintiffs' First Amended Original Petition (R. 20-36) and Defendants Motion to Dismiss and Answer to Plaintiffs' First Amended Original Peti-

tion. (R. 37-53) Those pleadings show that there were 46 Plaintiffs suing one (1) Defendant, the City of Dallas; they also show that the *only* Federal question raised was: "That the Defendant City of Dallas has made no provision for the acquisition of Plaintiffs' air rights either by purchase or condemnation and proposes to take and seize such rights for an alleged public use without compensating Plaintiffs therefor, all in violation of the provisions of the Constitution of the United States of America, Amendments V and XIV, * * *" (R. 8) The Regulations of the Federal Aviation Agency were alleged to sustain Plaintiffs contention that the proposed construction was illegal under Texas Statute Article 46-7B (R. 24-27) An injunction was sought against a *proposed* issue of airport revenue bonds in violation of State Statutes and the Charter of the City of Dallas. (R. 16, 17) The prayer for relief was for an injunction against construction of the parallel runway, and the *future issuance* of bonds not authorized by the Constitution of the State of Texas and not approved by a taxpayers' election. These pleadings demonstrate that no *outstanding* bonds were under attack, *nor could they have been because of the lack of holders of outstanding bonds as parties Defendant.*

The Summary Judgment in the Atkinson case was appealed to the Respondent Court of Civil Appeals which affirmed with an opinion reported in 353 S.W. 2d 275. In that opinion the Court stated at page 279: "In their eighth and tenth points appellants assert that the court erred in holding that the *proposed* issue of bonds was legal, * * * ". It then went on to support its position by citing *City of Corpus Christi*

ex rel. Harris v. Flato and *Womack v. City of West University Place* (p. 279). The *Womack* case 32 S.W. 2d 930, 931 held Plaintiffs could not enjoin the issuance of bonds because: "Appellants allege in their petition that the bonds were issued without authority of law and void, pleading nine reasons for their being void, for which reasons they say the bonds could not be collected. If the facts stated in the petition are true, the acts which it is the purpose of this suit to prevent could not fix a liability against the city, and the bonds would be void in the hands of every person who might become their holders, for there would not be a semblance of authority for their issuance, and in no event could the bonds injuriously affect the rights of appellants. *Polly v. Hopkins*, 74 Tex. 145, 11 S.W. 1084." The cited *Polly* case held at page 1085: "The ground on which injunctions at the suit of taxpayers, are granted to restrain a municipal corporation from issuing bonds, is that the issuance will be illegal, but under such circumstances as to make the bonds binding on the corporation if they go into the hands of innocent holders, and thus render taxation necessary to raise funds to discharge them." These cases have been frequently cited in Texas to sustain the proposition that taxpayers are not allowed to enjoin a *proposed* issue of bonds because of lack of a justiciable interest.

In the *Harris v. Flato case*, 83 S.W. 2d 433, the Court also held that the taxpayer lacked the justiciable interest necessary to maintain the suit. This was confirmed in *Hayward v. City of Corpus Christi* where the Flato judgment was pleaded in bar by the bondholders seeking to collect from the city.

The Court said in *195 S.W. 2d 995, 1002*: "We are in full accord with the holding of the San Antonio Court of Civil Appeals in the *Flato* case to the effect that Harris did not have the authority to maintain that suit, either in his own name or in the name of the city upon his relation as a taxpayer." The bond issue attacked in the *Flato* case was subsequently held void for want of an election by the Federal Court in *Hayward v. City of Corpus Christi*, 111 Fed. 2d 637. The Court of Civil Appeals in the Hayward case, supra, refused to hold the Federal Court decision res judicata in the bond holders action against the City to recover the value of construction performed.

The *Brown* case (R. 255-263) filed in the United States District Court on September 24, 1962 is in sharp contrast to the *Atkinson* case. The parties plaintiff numbered *120* as contrasted to the *46* in the *Atkinson* case; the Defendants numbered *23* as compared to *1* in the Atkinson case; the alleged cause of action was predicated upon the 14th Amendment to the Constitution of the United States, the Federal Civil Rights law, the Securities Exchange Act and Federal Statutes against using the mails to defraud. The Plaintiffs in the *Brown* case did not purport to represent a class, but sued as taxpayers individually; the Class in the Atkinson case was not a "taxpayers" class (R. 22); the Defendants included alleged bondholders who were sued as the Representatives of a Class consisting of the Owners and Holders of all outstanding City of Dallas, Texas Airport Revenue Bonds. (R. 258) The injunction against construction of the runway was sought on the grounds that such construction and use

would create a burden on Interstate commerce in violation of the United States Constitution, (R. 260-261) and Federal and State Statutes and Regulations. (R. 260) The Respondents in the Prohibition and Mandamus cases affirmatively denied that the facts involved in the *Brown* and *Atkinson* cases were the same. (R. 55, 12) Without receipt of evidence what Court could tell? This Court is fully aware of the rapidity with which Federal Regulations often change!

The *Atkinson* case could not be *res judicata* of the issues in the *Brown* case because the parties to the two actions were not the same, except for *29* out of the *120* persons involved; the issues in the *Brown* case involved *outstanding* bonds, identified by Serial Number; the prayer was for Judgment declaring them void; the Atkinson issues went to a *proposed* issue of bonds, unidentified and prayed for an injunction against issuance and sale. An injunction against payment of outstanding bonds could not have been obtained in the *Atkinson* case because of lack of necessary parties, the bondholders. Payment could be enjoined in the *Brown* case if the *outstanding* bonds be held void.

The doctrine of res judicata is further complicated in this case by reason of the fact that the Respondent Supreme Court of Texas refused a Writ of Error in the *Atkinson* case with the notation, "Refused, No Reversible Error". (R. 4) The legal effect of this Notation is set out in Rule 483, Texas Rules of Civil Procedure (App. A-7) as meaning that the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals, in all respects, has correctly declared the law. In short its anyone's guess as to what por-

tions of the Civil Appeals opinion in the *Atkinson* case was right, and what was wrong.

The doctrine of res judicata could not be applied to enjoin prosecution of the Federal action by Petitioners, but even if it were possible the record shows that it was inapplicable because of lack of identity of subject matter, issues, and parties. The rule is so well established that citation of authorities is deemed unnecessary.

POINT FOUR

The issuance of the Writ of Mandamus by the Respondent Supreme Court was without its jurisdiction and a denial of due process to the Petitioners.

The opinion of the Respondent Supreme Court of Texas sets forth certain principles of law which are concurred in by the Petitioners: "The court's judgment (Civil Appeals denial of Writ of Prohibition) is not reviewable by appeal or writ of error." "Respondents urge that the relators are not entitled to relief from the Court of Civil Appeals because they seek relief only against the plaintiffs and their attorney in Brown v. City of Dallas and ask only for a writ of prohibition; that writs of prohibition issue to courts and not to litigants. Technically speaking, that is correct, * * *". "The judgment of the Court of Civil Appeals in Atkinson v. City of Dallas is not a judgment of this Court." (R. 277) "Conferral of jurisdiction on a court to do a given act invests it with the power to do the act * * *, but whether the act is to be done may be either discretionary or mandatory. When exercise of the power is discretionary, its exercise may not be

compelled by a superior court." "When an adequate remedy is otherwise available to a holder of rights under an appellate court judgment, the court which rendered it, may in its discretion, decline to exercise its original jurisdiction." (R. 279) "The remedy lies in the trial court in the defensive plea of res judicata; and the fact that (R. 279) the holder of rights under the prior judgment may be put to some trouble, delay and expense in defending the second suit does not render his remedy so inadequate as to require intervention by the appellate court through exercise of its original jurisdiction to enforce its judgment in the first suit." "The Supreme Court and Courts of Civil Appeals are primarily Courts of Review, and there is nothing in the constitutional and statutory provisions, or in our decisions, requiring them to exercise original jurisdiction to enforce their judgments when the same relief may be obtained relatively as expeditiously and inexpensively in the trial courts." (R. 280) "The Court of Civil Appeals may not, however, order or direct dismissal of Brown v. City of Dallas. A suit cannot be dismissed from the docket of a court without an order of the court; and any writ directing dismissal of Brown v. City of Dallas would invade the jurisdiction of the United States District Court to control its own docket." (R. 286)

Petitioners disagree with the Court's statement of the number 1. question in the case, (R. 276) which *assumes* two of the paramount issues; the Plaintiffs were bound by the judgment in the *Atkinson* case and sought to relitigate issues determined by that judgment. Those were disputed questions of fact and law. (R. 54-58; 67-74)

Petitioners disagree with the Court's conclusion, referring to its statement that *technically* a writ of prohibition issued to courts and not litigants: "However, incorrect identity of the writ sought is of no significance." (R. 277) The issuance of such a writ depends upon the prohibited court's failure to perform a ministerial act; to justify an injunction, it must be clearly established that applicant has no adequate remedy at law, and that he will sustain irreparable damage if the writ does not issue; facts to sustain these two premises were not alleged in either the Petition for Writ of Prohibition or the Petition for Mandamus. All rules of law are technical; failure to apply those rules constitutes a denial of due process. The record demonstrates that an adequate remedy at law had been resorted to by the plea of res judicata in the Federal Court, and the Court of Civil Appeals so found. (R. 12, 14)

The Supreme Court further held: "that exercise of such jurisdiction is mandatory when an actual interference with the enforcement of the judgment is coupled with the second suit or when the mere prosecution of the suit destroys the efficacy of the judgment." (R. 282) "The Court of Civil Appeals denied the relief sought on the ground that it had no jurisdiction to grant it." (R. 282, 283) The Court applied these two statements to justify issuance of the Mandamus. However, the Court of Civil Appeals did not deny the Writ of Prohibition on the ground that it had no jurisdiction to grant it. The Court of Civil Appeals denied the writ, *after exercise of its judicial discretion*, because: "The pendency of Action No. 9276 in the United States District

Court does not invade our exclusive jurisdiction, though the issues in the suit may be the same as the issues decided in our judgment of affirmance. Ours is not the only Court which has jurisdiction to enforce a plea of res judicata in support of our judgment of affirmance of December 15, 1961. That defense may be and has been pled by the City in Action 9276 in the United States District Court, and that Court has jurisdiction to hear and give effect to the plea. (R. 12) Petitioners contend in effect our jurisdiction is invaded because Respondents have filed a suit in another Court in which Respondents try to ignore the finality of our judgment. And Petitioners further contend that the only way our jurisdiction can be protected and respected is by the issuance of a writ of prohibition restraining the litigants from further prosecuting their suit in the other Court where it is now pending. We do not agree to such contention. To agree would be equivalent to hold that the conclusiveness of a judgment could never be determined except by the Court that rendered it. (R. 13) The Court of Civil Appeals further held: "In the instant case the United States District Court has done nothing to repudiate our judgment of affirmance; and we shall not assume that it will do any such thing. To the contrary we must assume that the United States District Court will give full effect to our judgment by sustaining a plea of res judicata if the issues before it should prove to be the same issues we have previously adjudicated." (R. 14)

These quotations from the opinion definitely establish that that Court *recognized that it had jurisdiction* to grant

the writ prayed for, that exercising its discretion it determined that the filing of the Federal suit was not an interference with the judgment in the *Atkinson* case, and that an adequate remedy at law existed in the Federal Court for determination of the plea of res judicata. To justify issuance of the Writ, the Supreme Court of Texas reversed these findings made in the exercise of judicial discretion, which action could only be taken by a court having appellate jurisdiction.

The Respondent Supreme Court of Texas then went on to make findings of fact and law on the question of res judicata. (R. 283, 284) and found that all issues raised in the *Brown* case, had been decided in the *Atkinson* case, or *could* have been decided therein. This conclusion was based on misconstruction of the pleadings in the two cases. A patent error appears in the Court's opinion stating the issues in the *Brown* case: "At issue is the validity of certain revenue bonds, known as Love Field Revenue Bonds, *sought to be issued and sold* by the City of Dallas, * * *" (R. 283) The bonds attacked in the *Brown* case *had been issued and sold;* the prayer of the suit was to enjoin their payment. The second patent error in the Supreme Court's sustention of the plea of res judicata lies in their holding (R. 284): "All of these issues and all subsidiary issues raised by the pleadings but not here mentioned, as well as all issues which by diligence could have been raised and tried, were determined and foreclosed * * *" by the *Atkinson* judgment. The outstanding revenue bonds attacked in the *Brown* case could not have been declared void in the *Atkinson* case, because

they were not pleaded, there were no holders of outstanding bonds party to the action, and for lack of necessary parties no judgment declaring their invalidity or enjoining their payment could have been entered.

The action of the Respondent Supreme Court in *deciding the plea of res judicata* was an *exercise of discretion* reserved, in the instant case, to the Court of Civil Appeals. (R. 278)

The Supreme Court of Texas further erred in holding that the parties in the *Brown* case were members of the Class involved in the *Atkinson* case; the record demonstrates that the class in the *Atkinson* case was not described as taxpayers of the City of Dallas. (R. 22) If that were true, then the injunction or writ of prohibition ordered to be issued, and issued, was void as discriminatory against Petitioners herein. It is clearly illegal to enjoin part of the taxpayers of a City from attacking allegedly illegal bonds while permitting other taxpayers, not resident in a particular area to make such an attack.

The *principles agreeable to the issuance of the Writ of Mandamus* are stated in *State Board of Insurance v. Betts*, 158 Tex. 83, 308 SW 2d 846, 848:

"This Court is not vested with general supervisory power over the District Courts but its original jurisdiction is limited to that conferred by definite constitutional provisions and statutes enacted thereunder. (citations) Before the relief prayed for may be granted by this court it must definitely appear that the questioned orders of the district court are

wholly void. If an exercise of discretion by the district judge be involved *this Court may not assert its original jurisdiction to enforce its own judgment*, even though the actions of the district judge may have been improvident or otherwise erroneous. *Seagraves v. Green*, 116 Tex. 220, 288 SW 417. "The Writ (of Mandamus) will not lie to correct a merely erroneous or voidable order of the trial judge, but will lie to correct one which he had no power to enter, and which was therefore void."

The Denial of a Writ of Prohibition was an order which the Court of Civil Appeals had jurisdiction to enter. (R. 278) It was not void. The Supreme Court of Texas acted in excess of its jurisdiction in issuing the Writ of Mandamus contrary to agreeable priciples of law. The issuance of such Writ was also void under the Rule of Law set out in Central National Bank v. Stevens, *supra*, which after denying the right of a State Court to enjoin proceedings in a Federal Court stated: "The fact, therefore, that an injunction issues only to the parties before the court, is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is litigant in another and independent forum."

Petitioners submit that the action taken against Petitioners herein by the Respondent Supreme Court of Texas was void under State and Federal law and constituted a denial to Petitioners of due process and equal protection of the laws guaranteed by the Constitutions of the United States and Texas.

POINT FIVE

The Respondent Court of Civil Appeals was without jurisdiction to issue a Writ of Prohibition against Petitioners' prosecution of their Federal Court action, and its punishment of Petitioners for contempt for violation of a void writ constituted a denial to Petitioners of due process and equal protection of law.

The argument and authorities set forth under point one of this Brief is applicable to the authority of the Respondent Court of Civil Appeals to issue the alleged Writ of Prohibition.

In addition to the Writ being void as an illegal effort to prevent prosecution of a cause pending before the United States District Court, it was void under the law of the State of Texas.

The Court in its recitals precedent to its order of Prohibition stated that the writ was issuing in compliance with the orders of the Supreme Court of Texas, handed down March 13, 1963. (R. 78) If the Supreme Court Orders were void, then the Writ of Prohibition issued pursuant to it was also void.

It is further submitted that at the time of the issuance of the alleged writ of prohibition, the Respondent Court of Civil Appeals was without jurisdiction of the parties whom it sought to restrain. The Judgment of that Court denying the application of the Defendants in the *Brown* case for a Writ of Prohibition was entered October 24, 1962 (R. 15); Motion for Rehearing was denied November 23, 1962 (R.

19); the Judgment then became final for there was no provision for review by appeal or writ of error (R. 277) The Court therefore lost jurisdiction over all parties to the action, except for the purpose of enforcing the judgment entered.

Four and one-half months after that Judgment became final the Court of Civil Appeals without notice to the Petitioners herein or their Attorney entertained an ex parte application from the Defendants in the *Brown* case and purported to reverse the Judgment it had entered on October 24, 1962. It had then lost jurisdiction over the persons attempted to be restrained and the reversal of the Judgment and issuance of the writ of prohibition without notice constituted a lack of due process.

Even if it be conceded for the purpose of argument, that the Judgment might be reversed and a Writ of Prohibition issued without having the parties in Court, the Court of Civil Appeals wholly failed to comply with the statutes governing the issuance of its process.

Rule 394 of the Texas Rules of Civil Procedure (App. A-6) provides for the manner in which process shall issue from the Court of Civil Appeals, and the method for its service. That Rule states that a writ issuing from the Court shall bear the teste of the Chief Justice under the seal of the Court and be signed by the clerk thereof. It also provides that it shall be directed to the party or court to be served and that it may be served by any constable or sheriff of any county in the State of Texas where the person to be served could be found.

The record shows (R. 78-82) that the Writ was not directed to anyone; it did not bear the seal of the Court or the signature of the Clerk of the Court; it was not served by a constable or sheriff but was alleged to have been mailed. (R. 244 Exhibit 20, apparently never received in evidence)

For the reasons stated, the failure to comply with the requirements for issuance and service of process, the alleged writ was a nullity and had no legal effect. A construction of the effect of statutes and rules governing process was made in *Nichols v. Wheeler*, 304 SW 2d 233, R.N.R.E. p. 233 where the court after reciting requirements for service of process stated: "If applicable here, these requirements are mandatory and a failure to comply with such provisions renders the service of process here of no effect."

Even if it be conceded that the process was legal, the judgment of contempt was invalid as unsupported by the evidence presented in support of the charges of contempt. Primary defect is the total failure of the proponents of the Motion to introduce *in evidence any order restraining anyone from doing anything*, even though the Defendants in the contempt proceeding denied that any valid order had ever been issued. (R. 113, 172) The record (R. 242) also demonstrates that the Orders to Show cause were also not in conformity to the statutes governing the Courts process.

The record also shows that although Petitioners herein challenged the authority of the City Attorneys to file the Motion for Contempt (R. 111, 233) that authority was never proven.

Passing to the Judgment of Contempt (R. 248, 254) we find that some of the Petitioners were convicted of contempt for having "failed to request the United States District Court to dismiss Cause No. 9276, styled Daniel C. Brown et al., v. City of Dallas et al.,". An examination of the alleged writ of prohibition fails to show any direction to Petitioners to dismiss the *Brown* suit, and the Supreme Court expressly warned the Court of Civil Appeals not to direct or order dismissal of the *Brown* suit. (R. 286)

Twenty-six Plaintiffs in the *Injunction* case were held in contempt for filing that suit in Federal Court to enjoin the interference by the State Courts with their action pending in Federal Court. These people and their Attorney were punished, the clients by fine and the Attorney by twenty days in jail, even though such action was never prohibited by any order appearing in the record. *No other charge was placed against these litigants or the Attorney.* (R. 251) However, other Petitioners were charged and convicted of the same offense. (R. 250)

The Court having lacked jurisdiction to issue process prohibiting Petitioners from prosecution of their Federal Court action, and having wholly failed to comply with procedure governing issuance and service of State process, and having failed, in proceedings for contempt, to prove any order violated by the Petitioners, the conviction of contempt entered by the Court of Civil Appeals was a nullity and should be set aside as in violation of Petitioners rights of due process and equal protection of the laws.

CONCLUSION

All action taken by the Respondent Court of Civil Appeals, the Respondent Supreme Court of Texas, and the United States District Court for the Northern District of Texas, subsequent to the Judgment of the Court of Civil Appeals deny-iny Writ of Prohibition, entered October 24, 1962, Rehearing denied November 23, 1962 was in excess of the jurisdiction of said Courts and wholly void; such action constituted a denial to Petitioners of due process of law and equal protection of the law as guaranteed by the Constitutions of the United States and Texas.

Petitioners pray that this Court grant Judgment: 1. Directing the Supreme Court of Texas to reverse its Judgment entered in Cause No. A-9340, City of Dallas et al., v. Hon. Dick Dixon Chief Justice et al., on March 13, 1963. (R. 58)

2. Directing the Court of Civil Appeals, 5th Supreme Judicial District of Texas to reverse its Judgment of Contempt entered in Cause No. 16193, City of Dallas v. Daniel C. Brown et al., on May 22, 1963 (R. 248-254) restoring to the parties all fines and costs collected thereunder.

3. Directing the Court of Civil Appeals, 5th Supreme Judicial District of Texas to reverse its judgment or Order entitled Writ of Prohibition and Ancillary Orders (R. 78-82) entered in Cause No. 16193, City of Dallas et al., v. Daniel C. Brown et al., under date of April 16, 1963.

4. Directing the United States District Court for the Northern District of Texas to reverse its Judgments entered in

Cause No. 9276, Daniel C. Brown et al., v. City of Dallas et al., on May 9, 1963 (R. 307) and June 14, 1963 (R. 315, 316) and to proceed to trial of the cause on its merits.

5. Directing the United States District Court for the North-e District of Texas to reverse the Judgment it entered in Cause No. CA-3-63-120, Donovan et al., v. Supreme Court of Texas et al., (R. 335) entered June 21, 1963; and to render Judgment for the Plaintiffs in said action for the relief prayed for in the Complaint.

6. Judgment directing that all costs incurred in this proceeding and in the suits where judgments be reversed be taxed against Petitioners' opponents therein and the Respondents herein.

Respectfully submitted,

James P. Donovan

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Attorney for Petitioners.

I hereby certify that I have this 29th day of February mailed 5 copies of the foregoing Brief for Petitioners to Henry P. Kucera, Attorney for Respondents, 501 City Hall, Dallas 1, Texas.

James P. Donovan

JAMES P. DONOVAN

INDEX TO APPENDIX

APPENDIX

Relevant Constitutional and Statutory Provisions

Constitution of the United States

Article III, Section 1. The Judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress mat from time to time ordain and establish. * * *

Section 2. The Judicial Power shall extend to all cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their authority. * * *

Article IV. Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of citizens in the several states. * * *

Amendment V. No person shall be * * * deprived of life, liberty, or property, without due process of law.

Amendment XIV. Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; not shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE

Title 42, Section 1971. All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial

subdivision, shall be entitled and allowed to vote at all such elections without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

Title 42. Section 1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains and penalties, taxes, licenses, and exactions of every kind and to not other.

Title 42. Section 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

Title 42. Section 1985 (2d) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified; * * * or if

two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating in any manner, the due course of justice in any State or Territory, with intent to deny any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; * * *

Title 15, Section 77q. Fraudulent interstate transactions (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, to directly or indirectly—(1) to employ any device, scheme, or artifice to defraud, or (2) to obtain money or property by means of any untrue statement of a material fact or any ommission to state a material fact necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, or (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser. * * * (c) The exemptions in section 77c of this Title shall not apply to the provisions of this section.

Title 15. Section 77v. (a) The district courts of the United States, and the United States Courts of any territory, shall have jurisdiction of offenses and violations under this subchapter * * * and concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. * * *

Title 28. Section 1331. The District Courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 exclusive of costs or interest, and arises under the Constitution, laws or treaties of the United States.

Title 28, Section 1343. The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: * * * (3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Title 28 Section 2283. A Court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Title 28, Section 1651. (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

RULES OF FEDERAL PROCEDURE

Rule 12— * * * If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a

claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given a reasonable opportunity to present all material made pertinent to such motion by Rule 56.

TEXAS CONSTITUTION

Article 5, Section 3. The Supreme Court shall have appellate jurisdiction only except as herein specified, which shall be co-extensive with the limits of the State. Its appellate jurisdiction shall extend to questions of law arising in case of which the Courts of Civil Appeals have appellate jurisdiction under such restrictions and regulations as the Legislature may prescribe. * * *

Article 1, Section 3. All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public service.

Article 1, Section 19. No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

STATUTES OF TEXAS

Article 1733. The Supreme Court or any Justice thereof, shall have power to issue writs of procendo, certiorari and all writs of quo warranto or mandamus agreeable to the principles of

law regulating such writs, against any district judge, or Court of Civil Appeals or judges thereof, or any officer of the State Government, except the Governor.

Article 46d-9 * * * For such purposes, a municipality may issue general or special obligation bonds, revenue bonds * * * the authority hereby given for the issuance of such bonds and levy and collection of taxes to be exercised in accordance with the provisions of * * * Article 701 et seq. * * *

Article 701. The bonds of a county or an incorporated city or town shall never be issued for any purpose unless a proposition for the issuance of such bonds shall have been first submitted to the qualified voters who are property tax payers of such county, city or town.

TEXAS RULES OF CIVIL PROCEDURE

Rule 394. Issuance of process. Any writ or process issuing from any Court of Civil Appeals shall bear the teste of the Chief Justice under the seal of said court and be signed by the clerk thereof, and, unless expressly provided by law or by these rules, shall be directed to the party or court to be served, and may be served by the sheriff or any constable of any county of the State of Texas within which such person to be served may be found, and shall be returned to the court from which it issued. Whenever such writ or process shall not be executed, the clerk of such court shall issue another like process or writ upon the application of the party suing out the former writ or process.

Rule 483. "* * *. In all cases where the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, but is of the opinion that the application presents no error which requires reversal, the Court will deny the application, with the notation "Refused. No Reversible Error."